

Mixed-Finance Procurement Commonly Asked Questions

Q1: What are the federal regulations governing procurement for PHAs when Federal grant funds are involved?

The federal regulations included at 24 CFR part 85 (known as “part 85”) describe the procedures for conducting public procurements. The basic procedures related to such procurements are at part 85.36. The Mixed-Finance Interim Rule, at 24 CFR part 941 subpart F, contain additional information on mixed-finance procurement, including exceptions to part 85.

Q2: What is the relationship between federal and local procurement regulations?

Part 85 requires PHAs to use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law. Where local laws are more restrictive than federal rules, the local laws supercede Federal law.

Q3: What is an RFP?

A Request for Proposals (RFP) is a form of competitive proposal procurement in which price and other factors are evaluated. The PHA issues a written solicitation to prospective offerors to submit a proposal including a price for a specific scope of work, along with other information such as qualifications, experience, and approach to performing the work. The PHA then evaluates the proposal based on price and technical factors stated in the RFP, and enters into a fixed-price or cost reimbursement contract with the selected firm.

Q4: What is an RFQ?

A Request for Qualifications (RFQ) is a written solicitation for competitive proposals in which price need not be requested or used as an evaluation factor. Instead, technical qualifications are reviewed and the PHA enters into negotiations with the top ranked firm. In the event the PHA is unable to negotiate a fair and reasonable price with the top ranked firm, the PHA will enter into negotiations with the next highest ranked firm.

Q5: What is the difference between an RFP and an RFQ?

An RFP must request price for a specific scope of work and evaluate price as part of the selection process. An RFQ does not request price (although it may ask for price parameters or other financial information), and evaluates firms primarily on their qualifications, rather than on a stated approach to a specific statement of work.

Q6: Which type of competitive proposal procurement document should be used when?

Part 85 allows PHAs to use RFQs when procuring architect-engineering (A/E) services. The Mixed-Finance Interim Rule expands the ability of PHAs to use

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RFQs to include procurements of “partners” (i.e. developer; see Q7) in a mixed-finance transaction, unless prohibited by local procurement regulations. All other competitive proposal procurements must be via an RFP; this includes program managers, legal counsel, development advisors, and other consultants.

Q7: What is a partner?

A partner is “a third party entity with whom the PHA has entered into a partnership or other contractual arrangement to provide for the mixed-finance development of public housing units ... and that has primary responsibility with the PHA for the development of the housing units under the terms of the approved proposal” (see 24 CFR Part 941.604).

HUD has interpreted “partner” to mean a developer, responsible for carrying out development activities, and not someone acting solely in an advisory capacity. Advisors are not considered partners, and must be procured via an RFP.

Q8: What is a Developer?

An entity contracted to develop (and possibly operate) a mixed-finance development that includes public housing units, pursuant to the Mixed-Finance Interim Rule, and under the terms of a HUD-approved proposal. A developer most often has an ownership interest in the entity that owns and operates the units in a mixed-finance development (e.g., as the General Partner of a Limited Partnership).

Q9: What is a Program Manager?

An entity the PHA procures to represent its interests and to assume responsibility for coordinating all participants including the PHA, HUD, third party consultants to the PHA and (possibly) financing sources. A program manager may also assist the PHA in its negotiations with the developer. A program manager cannot also act as the developer, as a program manager, by definition, represents the PHA, while a developer does not.

Q10: How does procuring a partner affect future procurements?

In a mixed-finance project where the PHA has properly procured its partner via part 85, that partner need not procure subsequent entities (e.g. general contractor) via part 85, unless the PHA or its affiliate “exercises significant functions within the owner entity with respect to managing the development of the proposed units” and/or ongoing operation of the project. Where the PHA or its affiliate exercises significant functions, HUD may make a case-by-case exception for the need to comply with part 85 if the owner entity develops an acceptable alternate procurement plan.

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Q11: What is an owner entity?

An entity that will own the public housing units in a mixed-finance development.

Q12: What does it mean to “exercise significant functions”?

HUD has determined that when the PHA or its affiliate is the sole or managing general partner in the ownership entity, the PHA or its affiliate is exercising significant functions, and 24 CFR Part 85 applies for subsequent procurements. If the PHA or its affiliate acts as the developer, part 85 applies. Part 85 also applies for subsequent procurements if the developer is a subgrantee, such as when a City agency, acting as a subgrantee, is the developer.

Q13: What kinds of activities do not constitute “significant functions”?

In all cases, the PHA should discuss its particular situation with HUD to verify whether the PHA’s roles will require the use of part 85 in subsequent procurements. However, HUD has determined that the following do not trigger the use of part 85:

- ?? monitoring units receiving operating subsidy to ensure compliance with various regulations;
- ?? coordinating communications with agencies regarding project financing and operations;
- ?? maintaining the waiting list;
- ?? providing CSS services; and
- ?? attending construction meetings and reviewing draws.

Q14: Why would a PHA establish an affiliate?

The goal of establishing an affiliate for many PHAs is to limit liability. Acting as developer, a PHA may want to establish an affiliate specifically for purposes of developing the site and owning the improvements in a mixed-finance development in an effort to limit exposure of all the PHA’s resources. However, not all PHAs are permitted to create an affiliate, depending upon the state-enabling legislation.

Q15: If a PHA or its affiliate is acting as its own developer, what procurement requirements need to be followed?

A PHA or its affiliate acting as developer must follow part 85 in all procurements.

Q16: Is it possible to procure a consultant for a mixed-finance project using the small purchase method?

Yes, so long as the total value of the services, including both the original contract and all change orders, does not exceed \$100,000, or the local small purchase threshold, whichever is lower.

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Q17: Can a PHA procure a developer or program manager using a noncompetitive (e.g. sole source) procurement?

Noncompetitive procurements are an exception to part 85. HUD's headquarters office must approve the use of any noncompetitive procurements. In addition, PHAs may not certify a procurement that is noncompetitive.

Q18: Are there any rules regarding the make-up of the Selection Committee?

Yes. All members of the committee must be trained to understand and implement the selection process and its obligations. HUD has required a majority of the members of the committee to be PHA staff or board members, as the PHA has fiduciary responsibility for the funds and cannot cede control of their use. In addition, no member of the Selection Committee can have a conflict of interest in the procurement.

Q19: What constitutes a "conflict of interest" by a member of the Selection Committee?

Part 85 bars PHA employees, officers, or agents from participating in a procurement from which they could benefit financially. Specifically, it is a breach of ethical standards for any PHA employee, officer, or agent to participate directly or indirectly in a procurement if:

1. the employee or any relative has a financial interest pertaining to the procurement;
2. a business or organization in which the employee or any relative has a financial interest pertaining to the procurement;
3. any other person, business or organization with whom the employee or any relative is negotiating or has an arrangement concerning prospective employment is involved in the procurement.

Upon discovery of actual or potential conflict, the employee, officer, or agent shall promptly disclose the conflict in writing to the PHA Executive Director or Board. The PHA will then make a public disclosure in accordance with its internal procurement procedures. Unless the PHA determines there is no conflict of interest or seeks a waiver from HUD, a conflict of interest will usually result in a written statement of disqualification and the withdrawal of the employee, officer, or agent from further participation in the transaction. (See 24 CFR part 85.36(b)(3).)

Q20: When should a PHA perform a cost or price analysis for a procurement?

Part 85.36(f)(1) requires a cost/price analysis in connection with any procurement action, including a change order. At a minimum, PHAs are to estimate the value of the services solicited prior to the receipt of bids, and use this "independent cost estimate" as a tool for evaluating cost reasonableness.

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Q21: On what should a PHA base its independent cost estimate?

In addition to an understanding of the market price for the services solicited, a PHA should take into account the applicable cost principles referenced at 24 CFR part 85.22 (for PHAs, OMB Circular A-87).

Q22: Can the RFP or RFQ require respondents be local, M/WBE, or not-for-profit?

No. However, the evaluation criteria can give points for M/WBE firm participation on the team, and points can be awarded for knowledge of the local market. Part 85 expressly prohibits the use of local geographical preferences unless a Federal statute mandates or encourages local preference. In addition, some localities or states prohibit the use of preferences based on race or sex, including M/WBE preferences.

Q23: Can a PHA require respondents be resident-owned businesses?

Yes. A PHA is permitted to engage in “alternative procurement procedures” under 24 CFR part 963, under which the PHA sets aside a contract for resident-owned businesses (as defined by part 963). The total worth of such contracts cannot exceed \$1 million. In selecting the resident-owned business, the PHA must award the contract to a resident-owned business that possesses the ability to perform successfully under the terms and conditions of the procurement. In addition, the PHA must demonstrate the price is reasonable (i.e. does not exceed the independent cost estimate and the price normally paid for comparable product or services), and maintain all required records.

Q24: What are the required clauses in a contract?

There are thirteen required clauses, listed in 24 CFR part 85.36(i), some of which apply only to certain types of contracts (e.g. compliance with Davis-Bacon wage rates). The required provisions are:

1. Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold, currently \$100,000.)
2. Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of \$10,000.)
3. Compliance with Executive Order 11246 of September 24, 1965, entitled “Equal Employment Opportunity,” as amended by Executive Order 11375 of October 13, 1967, and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees.)

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4. Compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3). (All contracts and subgrants for construction or repair.)
5. Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a-7) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts in excess of \$2,000 awarded by grantees and subgrantees when required by Federal grant program legislation.)
6. Compliance with Sections 103 and 107 of the Contract Work Hours, and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts awarded by grantees and subgrantees in excess of \$2,000, and in excess of \$2,500 for other contracts which involve the employment of mechanics or laborers.)
7. Notice of awarding agency requirements and regulations pertaining to reporting.
8. Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.
9. Awarding agency requirements and regulations pertaining to copyrights and rights in data.
10. Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.
11. Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.
12. Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1867(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of \$100,000.)
13. Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871.)

Q25: What is the relationship between the RFP and the contract?

The contract is the end result of the RFP. Accordingly, all services for which the PHA and selected firm have an agreement, either in the original contract or in a subsequent change order, must be solicited in the original RFP and included in the PHA’s proposal. In addition, the contract generally incorporates the RFP and proposal by reference.

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Q26: What is the relationship between the RFQ and the Development Agreement?

The Development Agreement is the end result of the RFQ. Since an RFQ need not request a price or include a fixed scope of work, the Development Agreement is the result of the negotiations between the PHA and the Developer. The Development Agreement includes all terms, including scope of work, compensation, schedule, and each party's rights and liabilities.

Q27: If a PHA is unable to define a detailed scope of work for a multi-year contract, what is the appropriate procurement method?

Procurement for consulting services must be via an RFP. However, procurement regulations do allow PHAs to issue an RFP and to enter into a contract for services on a task order basis. In this instance, the PHA issues an RFP with a general scope that covers the life of the project and a specific scope and task list for the first phase of the project. Respondents will provide a price for the more narrow scope and hourly rates for subsequent task order negotiations, and the PHA will make the award based on price and other factors. For subsequent phases, the PHA will draft more detailed scopes, the contractor would give a price based on this scope, and the PHA and contractor could negotiate if necessary. This is only permitted if the original scope contained language covering the specific tasks included in the subsequent task orders.

Q28: When procuring for services using a base scope with a series of task orders, can a PHA create a list of several contractors, each of whom could bid on subsequent task orders?

Yes. PHAs can "pre-qualify" a list of firms based the scores of firms under an RFP issued by the PHA. The highest ranking firms could then be put on a prequalified list. Subsequent task orders under the contract would be then competed among the firms on the list. As with the first task order, each firm would need to provide a not-to-exceed limit for the task order.

Q29: Does the cost/price analysis requirement apply to each specific task order?

As when undertaking any contract action, PHAs need to do a cost or price analysis for each task order. If the PHA is competing the task order among several firms, a price analysis is needed. If only one firm is providing a price for the services, the PHA must do a full cost analysis.

Q30: May a PHA issue an RFP that asks only for hourly rates?

No. HUD does not consider hourly rates to be sufficient price competition, as the total value of the services is dependent on the number of hours worked. PHAs must ask for a not-to-exceed limit for a specific set of services.

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Q31: If I have procured a consultant or set of consultants to write a HOPE VI application, do I need to reprocure them as my implementation team?

Yes, unless the original RFP included implementation in the scope of work.

Q32: Can a firm who participated previously in some aspect of development planning or implementation respond to subsequent solicitations for services at the project?

Yes. However, to ensure fair and open competition the PHA must make every effort to provide all potential respondents with equal access to information.

Q33: What is a developer fee?

A developer fee is money paid to a developer to cover the developer's overhead and profit. The fee covers the staff and other necessary resources to coordinate project development, including the securing of financing, and compensates the developer for assuming these responsibilities and the associated risks. HUD's Cost Control and Safe Harbor Standards indicate that the safe harbor standard for developer fee is 9%, with a maximum of 12%.

Q34: How is the developer fee calculated?

As a percentage of certain project costs, which are all funds less the following:

- ?? PHA costs (legal, admin, PM services)
- ?? CSS costs
- ?? relocation costs
- ?? reserves, and
- ?? the fee itself.

If the developer team is responsible for coordinating items such as acquisition, demolition, and remediation, the costs of the items should be included in the project costs on which the percentage fee is calculated; if the PHA undertakes those items on its own, then those costs are excluded.

Q35: What kinds of developer compensation are excluded from the fee?

If a developer is procured for non-development services such as master planning services, relocation, or CSS, and those services were solicited in the original RFQ, the developer is typically compensated for those services according to a fixed-fee schedule negotiated by the developer and PHA. This compensation is typically separate from the developer fee, and the costs for those services are excluded from the project costs from which the developer fee is calculated.

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Q36: What are third-party costs?

Third-party costs are actual costs for services incurred by the developer that are not part of the fee. Examples include A/E services, market studies, and construction. These costs are considered project costs and are paid out of available sources.

Q37: How should third-party costs incurred during predevelopment be paid?

PHAs and Developers may negotiate arrangements by which the PHA reimburses the Developer for some or all of third-party costs incurred prior to loan closing (referred to as "predevelopment"). These costs could include demolition, remediation, market studies, or A/E services. HUD's Cost Control and Safe Harbor Standards state that third-party predevelopment costs are split 75% PHA/25% developer until closing, at which time the developer is reimbursed for the remaining 25% out of sources. HUD encourages PHAs to negotiate other arrangements that reflect appropriate levels of risk by each party and the length of the predevelopment period. Developers who bear more than 25% of the predevelopment costs over a long predevelopment period may be entitled to a higher developer fee, while those that bear less than 25% or bear costs for only a short period of time should expect to receive lower compensation.

Q38: What is an identity of interest party?

An identity of interest party is an entity with ownership interest in different businesses working on the same mixed-finance project. Examples include a developer (or its parent corporation) with an ownership interest in a general contractor, property management firm, and/or equity investor.

Q39: Can developers use identity of interest parties?

To use an identity of interest general contractor, the owner must demonstrate that the related entity was the lowest bidder submitted in a public request for bids, or seek a waiver from HUD (see 24 CFR part 941.606(n)(1)(ii)(B)). The owner may select identity of interest parties for activities other than those of a general contractor (e.g. property manager).

Q40: Are there any procurement requirements when using a “preferred” equity investor, i.e. an investor who does not have an identity of interest but with whom the developer prefers to work?

While the use of related or preferred entities as investors is permitted, HUD's Cost Control and Safe Harbor Standards encourage PHAs to have their procured developer “shop around” to ensure they are getting a competitive yield. “Competitiveness” should be considered in the size of equity raise (i.e. cents on the dollar), pay in schedule and in the terms negotiated between the investor and the developer (e.g. guarantees, level of reserves, etc.). HUD may issue further guidance to clarify what procedures a PHA should ask its procured developer to undertake in order to ensure obtaining a competitive yield.

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Q41: What are the requirements for mixed-finance procurement certification?

Any PHA that has attended a HUD-sponsored mixed-finance procurement training and is not troubled, mod-troubled, or otherwise required to submit procurements for HUD review may certify the procurement. Certification permits PHAs to advertise for program managers or developers without receiving HUD approval of the RFQ or RFP, and yields a faster process. Certification does not protect PHAs from audit or relieve any record-keeping requirements. PHAs still have to submit the Program Manager contract or Developer Agreement to HUD for review and approval, prior to execution.

Q42: When does the PHA complete the procurement certification?

The certification should be submitted to HUD with the Development Agreement or Program Management contract, which HUD must approve before execution.

Q43: Can a PHA certify to a procurement that took place prior to its attendance at the HUD-sponsored procurement training and which HUD has not yet approved?

No. A PHA may only certify to a procurement if the RFP or RFQ was issued after the date of the mixed-finance procurement training attended by the PHA staff.